



Department of Environmental Quality

*To protect, conserve and enhance the quality of Wyoming's
environment for the benefit of current and future generations*



Mark Gordon, Governor

Todd Parfitt, Director

Shannon Anderson
Powder River Basin Resource Council
934 North Main Street
Sheridan, Wyoming 82801

Jeffrey Fleischman
Field Office Director
Office of Surface Mining Reclamation and Enforcement
Casper Field Office
P.O. Box 11018
Casper, Wyoming 82604-7032

RE: Complete investigation of Citizen Complaints

Ms. Anderson and Mr. Fleischman

The Wyoming Department of Environmental Quality (DEQ), Land Quality Division (Division) has received a copy of the August 26, 2019, Citizen Complaint submitted by the Powder River Basin Resource Council (PRBRC). In this complaint, the PRBRC asserts the permits issued to Contura Coal West (Contura) for operations at the Eagle Butte and Belle Ayr mines are in violation of the Environmental Quality Act (Act) and/or DEQ's Land Quality-Coal Rules (Rules). The PRBRC alleges in their complaint that Contura must provide the Division with the information required for a "Temporary Cessation of Operations" (TCO) in an annual report under Chapter 4, Section 2(u) of the Coal Rules and that Contura must revise its permits for the Eagle Butte and Belle Ayr mines to include changes in the mine and reclamation plans.

The Division has completed its investigation into the two alleged violations. The investigation concluded that no violations exist in relation to TCO or the approved mine and reclamation plans for the Belle Ayr and Eagle Butte permits under Wyoming's approved program. The Division's findings are described below.

I. There has not been a "Temporary Cessation of Operations" at Belle Ayr or Eagle Butte.

Blackjewel, LLC is the current operator of the Eagle Butte and Belle Ayr mines. When Blackjewel filed for Chapter 11 bankruptcy on July 1, 2019, it put both of these mines into a reduced operational status. With debtor-in-possession financing, Blackjewel in cooperation with Contura (the permit holder for both mines) and the bankruptcy court has kept workers onsite since July 5, 2019 to secure the mine premises, perform safety measures, keep the two mines in compliance with their approved permits, and extract due diligence coal for resource

protection and commercial sale. The DEQ/LQD has conducted multiple inspections of the Belle Ayr and Eagle Butte mines to verify the compliance of the operations. The Office of Surface Mining and the Bureau of Land Management have also accompanied DEQ on one of the inspections. The finalized WDEQ inspection reports are available by public record request.

Belle Ayr Inspection Summary:

<u>Inspection Date</u>	<u>Report Date</u>	<u>Compliance Issues (Yes or No)</u>
6/20/2019	06/26/2019	No- None noted during inspection
07/02/2019	07/09/2019	No- None noted during inspection
07/24/2019	08/15/2019	No- None noted during inspection
08/12/2019	08/28/2019	No- None noted during inspection
08/27/2019	Pending	No- None noted during inspection

Eagle Butte Inspection Summary:

<u>Inspection Date</u>	<u>Report Date</u>	<u>Compliance Issues (Yes or No)</u>
6/20/2019	07/10/2019	No- None noted during inspection
07/02&03/2019	07/09/2019	No- None noted during inspection
07/24/2019	08/15/2019	No- None noted during inspection
08/28/2019	Pending	No- None noted during inspection

The investigation has concluded that coal was shipped from the operations on July 1, 2019, and then on July 5, 2019. Coal shipments have continued during the reduced operations period with between 6 and 8 unit trains per week from July 5, 2019, to the time of this letter. The DEQ/LQD inspections conducted on August 27 and 28, 2019 both confirmed that coal extraction and shipment continues to occur at both mine sites.

The regulations require that when a coal mine operator knows that a "Temporary Cessation of Operations" (TCO) will last for a period of more than 30 days, the operator must provide the Division with the information that would be required in an annual report. DEQ Land Quality-Coal Rules, Ch. 4, § 2(u). This would include a report on:

- (A) The extent to which the mining operations have been carried out;
- (B) The progress of all reclamation work;
- (C) The extent to which expectations and predictions made in the original or any previous reports have been fulfilled, and any deviation therefrom, including but not limited to the quantity of overburden removed, the quantity of minerals removed, and the number of acres affected.

Wyo. Stat. Ann. § 35-11-411(a)(ii). The operator planning a TCO must also submit a "revised schedule or timetable of operations and reclamation and an estimate of the number of acres to be affected during the next one (1) year period." Wyo. Stat. Ann. § 35-11-411(a)(iii).

While the Rules do not define a TCO, the Division's Standard Operating Procedures (SOPs) outline three different scenarios that constitute a TCO. The first involves an entire mine site "where there is no activity within the permit area except monitoring and maintenance." SOP 5.4 § IV.B. The other examples include pits within a mine site that are "left partially open due to special needs for certain grades or quality of coal" or trenches left open "because the pit will eventually turn back on itself and mine along that trench." SOP 2.3 § III.A.1.b. Each of these examples represents a scenario where the operator elects to delay reclamation to a later date because of economic considerations. The purpose of DEQ's TCO provision is "to make sure everyone, including the public, is aware that some areas will be in an unreclaimed condition for an extended period of time" when market or mining conditions require a delay. SOP 5.4 § IV.A. The Eagle Butte and Belle Ayr mine sites have not been inactive for more than the five day period between July 1 and July 5, 2019. Therefore the 30-day threshold of inactivity was not met for a TCO filing.

Although Blackjewel has slowed its mining operations due to economic considerations and manpower limitations, these circumstances are not considered a TCO by the Division because the mines are still conducting due diligence commercial coal production for resource protection, are in compliance with the approved mine and reclamation plan sequences in their respective permits, are current on their financial assurance requirements, and are conducting routine maintenance for site environmental compliance.

For these reasons, TCO does not apply at this point and time. TCO applies when there is no mining or reclamation activity within the permit or pit specific area in question for a period of 30 days. Because Blackjewel is not proposing to delay reclamation for specific pits or trenches, the appropriate reference areas are the entire mine sites and the approved permit mine and reclamation sequences at Eagle Butte and Belle Ayr. With active mining operations occurring at both mines, the TCO provisions do not apply.

The Division's interpretation of TCO is consistent with OSMRE regulations and guidance documents. For example, OSMRE's TCO provision, at 30 C.F.R. § 816.131, specifically references "areas in which there are no current operations, but in which operations are to be resumed under an approved permit." From this definition, TCO would not apply to a mine with any level of active operations. This view was reinforced by OSMRE in a proposed rulemaking, where OSMRE stated:

[A]pproval of temporary cessation will terminate upon the resumption of surface or underground mining activities. Resumption of surface or underground mining activities would include **any excavation or other activities conducted for the purpose of exposing or removing coal**, but would not include environmental protection maintenance activities, backfilling and grading, or abatement of violations.

56 Fed. Reg. 60012 (Nov. 26, 1991) (emphasis added). OSMRE's fee reporting forms further show that a mine does not enter TCO so long as the operator is excavating coal. The OSM-1 Form directs operators to report all coal tonnage sold, used, or transferred during a calendar

quarter. According to OSM's Payer Handbook, the operator of a mine in TCO should "send an OSM-1 Form to report zero coal production." OSMRE, Payer Handbook, available at <https://sscr.osmre.gov/public/Handbook/Documents/payerhandbook2013.htm> (last accessed September 3, 2019). By implication, TCO does not apply when a mine has any amount of coal production.

Because there is active mining occurring at both Eagle Butte and Belle Ayr, neither Blackjewel nor Contura is subject to the requirements to file a TCO action as detailed in Chapter 4, Section 2(u) of the Rules. Instead, the Division considers both Eagle Butte and Belle Ayr to be "active" mining operations, as described in Chapter 16, Section 1(a)(i) of the Rules. Accordingly, the Division is completing monthly inspections of the mines, with at least one quarterly review of the operator's overall compliance. The Division will also require Blackjewel or Contura to provide new annual reports for the mines when they become due annually as required on the anniversary date (Belle Ayr Permit-214, November 26th, and Eagle Butte Permit-428, May 5th) of each mine permit. The Annual Report should not be construed as a permit document. The document is as specified an "Annual Report" and the permit is the functional contract with the state for compliance purposes.

II. Contura is not required to revise its permit at this time.

Blackjewel's bankruptcy has left the future of the Eagle Butte and Belle Ayr mines uncertain. Contura's bid to purchase the Eagle Butte and Belle Ayr mines was approved by the Bankruptcy Court, but the sale is contingent upon Contura reaching an agreement with the federal government. To date, no agreement has been reached and the sale of the mines has not closed. Revision of Contura's permit would be necessary in the event operations cease for 30 or more days at the Eagle Butte or Belle Ayr mines or move to a closure plan following the conclusion of the bankruptcy proceedings. In these circumstances, public notice of the permit revision would be required under Wyoming Statutes § 35-11-402(a)(x). However, because Contura's purchase of the mines is not finalized, the ultimate determination of the future of the operations has not been made and it is premature for the Division to require a permit revision projecting a future change to the mine and reclamation plan that may or may not occur.

Permit revisions are required any time an operator plans to create surface disturbances that are not contemplated in the original mine and reclamation plans. In a permit revision application, operators must provide details regarding "proposed newly affected lands," including the extent of the proposed disturbance, the proposed future use of the land, and resulting changes in the total costs of reclamation DEQ Land Quality-Coal Rules, Ch. 13, § 1(d)(iv)(B). Blackjewel's bankruptcy has temporarily reduced production levels at Eagle Butte and Belle Ayr but has not resulted in any new lands to be affected. Current operations at Eagle Butte and Belle Ayr are within the scope of approved mine and reclamation plans. For these reasons, the Eagle Butte and Belle Ayr mines do not necessitate a permit revision at this time. Instead, the Annual Report and more appropriately the Bureau of Land Management Resource Recovery and Protection Plan (R2P2) is the appropriate place for Blackjewel or Contura to provide details on reduced production. See Wyo. Stat. Ann. § 35-

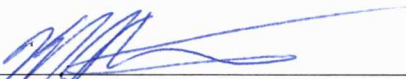
11-411(a)(ii)(C) (requiring the operator to report the "extent to which expectations and predictions made in the original or any previous reports have been fulfilled, and any deviation therefrom...").

CONCLUSION


The Division has exclusive jurisdiction to regulate surface coal mining in Wyoming and should be entitled to deference in the enforcement of Wyoming's approved program. The results of the investigation conclude that the Division has good cause for taking no action to address the alleged violations. A regulatory authority has good cause for failing to correct a violation when, under a State program, "the possible violation does not exist." 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i). OSMRE should accept the Division's findings that no violations currently exist at the Eagle Butte and Belle Ayr mines. According to OSMRE policy, "OSMRE will make a finding of appropriate action or good cause if the [regulatory authority] presents a rational basis for its decision." OSMRE Directive INE-35 § 4.g. (May 3, 2019). This finding should apply, even when "OSMRE would have acted differently...in a particular situation." *Id.*

The Division has inspected the Eagle Butte and Belle Ayr mines and determined that (1) a temporary cessation of operations has not occurred at either location and (2) permit revisions are not warranted at this time. The Division requests, in accordance with INE-35, that OSMRE find the Powder River Basin Resource Council's concerns have been resolved satisfactorily.

Sincerely,



Kyle J. Wendtland, Administrator
Land Quality Division



Todd Parfitt, Director
Wyoming Department of Environmental Quality

Date: 9/10/19

cc: Randal Luthi, Senior Energy Advisor, Office of Governor Mark Gordon
David Berry, OSMRE Regional Director
Matt Van Wormer, Wyoming Attorney General Office
Mark Rogaczewski, LQD District 3 Supervisor